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CHARLES ELMORE CROPLEY
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Supreme Court of the United States

OCTOBER TERM, 1942.

No. 269.

MARGARET M. BRADY, as Administratrix of James P. Brady, deceased,

Petitioner,

against

ROOSEVELT STEAMSHIP COMPANY, INC.,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

MEMORANDUM IN OPPOSITION TO RESPONDENT'S PETITION FOR REHEARING.

SIMONE N. GAZAN
Counsel for Petitioner.

AUGUST P. KLEIN,
BENJAMIN H. SIFF,
Of Counsel.

ACKERMAN PRESS, Inc., 302 East 44th St., Phone VAnderbilt 6-1293

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POINT ONE.

It is true that on the trial of this case in the District Court the defendant moved to dismiss the complaint on the ground that there had been a failure of proof of a cause of action against the defendant. These motions were overruled and exceptions taken.

In addition to these motions to dismiss for insufficiency of proof of facts to establish a cause of action, the defendant also moved to dismiss the complaint upon the ground

that *the court was without jurisdiction because the exclusive remedy was in admiralty under the Suits in Admiralty Act.* This motion also was denied.

However, after an adverse verdict on the facts, duly approved by the trial judge, the defendant, in prosecuting its appeal to the Circuit Court of Appeals, *waived* and *abandoned* its point that there had been insufficiency of proof of facts to establish a cause of action, by not assigning error thereon, or arguing that point in its brief.

In the Appellant's brief in the Circuit Court of Appeals the trial rulings were mentioned only as a part of the historical statement of what had transpired in the court below, but there never was any specification of error that the court below had erred in refusing to dismiss the cause of action for failure of proof, nor was there any assignment of error in the Circuit Court of Appeals complaining of any error on the part of the trial judge, *other than the refusal to dismiss the case for lack of jurisdiction.*

We invite the court to read Petitioner's Reply Brief, pages 1-4, filed in this court, which sets forth fully the record and the law which would estop the Respondent herein from raising, in this court, any error claimed to have been committed by the trial court and which was not made the subject matter of assignment of error in the Circuit Court of Appeals.

The defendant below, the Respondent here, was quite content to rely *solely upon the one alleged error*, to wit, that the court was without jurisdiction because the suit should have proceeded in admiralty. That was the only point raised and argued before the Circuit Court of Appeals; that was the only point decided by the Circuit Court of Appeals, and to attack *that* ruling the Petitioner herein sought a review.

This court granted certiorari to review that point.

True, the Respondent, once the certiorari was granted, attempted to raise in this court the questions raised in the trial court, but which were not presented to the intermediate Circuit Court of Appeals.

This court properly ignored the attempt by the Respondent to have this court review the trial court rulings which had been abandoned and waived by the defendant below because not raised in the Circuit Court of Appeals.

> "Review by this court will be confined to errors alleged in the Petition and this court will not consider questions not raised in the court below, even though certiorari brings up the whole record."

Supreme Court Rule 38, par. 2, following 28 U. S. C. A., Sec. 354;
Gen'l Talking Corp. v. Western Electric, 304 U. S. 175 (1);
Crown Cork Co. v. Ind. Pier Co., 304 U. S. 159.

POINT TWO.

We do feel that a modification of this court's opinion might be considered because we do not see the necessity for sending the cause back to the Circuit Court of Appeals to determine whether factual proof of a cause of action against Respondent had been made. The Circuit Court of Appeals should not go into that question because it is foreclosed by a long line of decisions which hold that verdicts, supported by evidence, and approved by the trial judge, will not be disturbed on appeal, and, furthermore, no point was raised before it by the Appellant therein (Respondent here) that the verdict was without evidence to support it. The only question before the Circuit Court of Appeals was one of jurisdiction. That was the only point mentioned in Appellant's brief and the only question argued in Appellant's brief, and consequently was the only question decided by the Circuit Court of Appeals. The Circuit Court of Appeals did not decide any factual question because it was not before it.

We ask that the concluding paragraph of this court's opinion be modified to the extent of reversing the deci-

sion of the Circuit Court of Appeals and reinstating the judgment, without presenting to the Circuit Court of Appeals a question for decision which had not previously been raised before it, and which had been abandoned by the Appellant.

There is ample precedent for this.

Keys v. Pennsylvania Railroad, 308 U. S. 529;
Skelly v. N. Y., N. H. & H. R. Co., 93 Fed. (2d) 479 (4);
Bernstein v. Greenfield, 281 N. Y. 77.

To grant the request of the Respondent as made in its Petition for Rehearing, would be equivalent to sending this case back for a re-trial on the facts when those questions were settled by a jury and approved by the trial court, and as to which neither specification nor assignment of error was made on appeal.

Having abandoned all alleged errors on the trial, except the denial of its motion which attacked the jurisdiction of the court, this Respondent is entitled neither as favor nor right to a re-trial of the factual issues before this court, before the Circuit Court of Appeals or before the trial court. That question is *res judicata*.

We feel that this court, having reversed the only question of law properly before it, that a direction that the judgment be reinstated would be in order, and we ask that the opinion be modified to that extent.

Respectfully submitted,

SIMONE N. GAZAN,
Counsel for Petitioner.

AUGUST P. KLEIN,
BENJAMIN H. SIFF,
of Counsel.